

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	WT Docket No. 02-100
Federal Preemption of	)	
Anne Arundel County Ordinance	)	DA 02-1044
Regulating Radio Frequency Interference	)	

To: The Wireless Telecommunications Bureau, Commercial Wireless Division,  
Policy and Rules Branch

**COMMENTS OF THE  
TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Telecommunications Industry Association (“TIA”) hereby submits comments in support of Cingular Wireless LLC’s (“Cingular”) request that the Federal Communications Commission (“Commission”) issue a Declaratory Ruling preempting recent amendments to Section 28 of the Anne Arundel County Zoning ordinances. TIA is the leading trade association representing the communications and information technology industry, with over 1,100 member companies that manufacture or supply the products and services used in global communications. Among their numerous lines of business, TIA member companies design, produce and deploy wireless network and terminal equipment.

Although termed a “zoning” ordinance, the Anne Arundel County ordinance at issue has both the purpose and effect of regulating radio frequency interference (“RFI”). The Commission has the exclusive statutory authority to regulate RFI and has issued numerous regulations regarding RFI, such that it occupies the field. Anne Arundel

County impermissibly seeks to regulate RFI in conflict with existing federal regulations and the Communications Act of 1934 (the “Act”). Accordingly, the Commission should preempt the Anne Arundel County Zoning ordinances. At the same time, TIA continues to support the Commission taking whatever steps are necessary under its own authority to ensure that mission critical public safety communications are not compromised by harmful interference.

### **I. Regulation of RFI Is Federally Preempted**

Congress has the power to preempt state and local law under the Supremacy Clause of the Constitution. *See* U.S. Const. Art. VI, cl. 2. Congress’s preemption power extends over both state and local ordinances. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991). Federal law preempts state or local law in three situations: (1) express preemption, when the statute reveals an express congressional intent to preempt state law; (2) field preemption, when the federal scheme of regulation is so pervasive Congress must have intended to leave no room for a State to supplement it; and (3) conflict preemption, when compliance with both the federal and state laws is impossible or when the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *See Mount Olivet Cemetery Ass’n v. Salt Lake City*, 164 F.3d 480, 486 (10<sup>th</sup> Cir. 1998). In the context of RFI regulation, there is both federal field preemption and conflict preemption.

In the Act, Congress created a “unified and comprehensive regulatory system for the [broadcasting] industry.” *National Broad. Co. v. United States*, 319 U.S. 190, 214 (1943). The stated purpose of the Act is “to maintain the control of the United States over all channels of radio transmissions.” 47 U.S.C. § 301. The plain language of the

Act reveals a Congressional intent to grant broad power to the Commission to regulate all aspects of the telecommunications field.

Other sections of the Act indicate that Congress intended for the Commission to have exclusive control over RFI. In particular, § 302(a)(1) authorizes the Commission to “make reasonable regulations... governing the interference potential of devices.” In addition, § 303 generally empowers the Commission to regulate broadcasting technology and RFI issues. *See, e.g.* 47 U.S.C. § 303(d), (e) and (f). When read together, these statutory provisions make it clear that Congress intended the Commission to possess *exclusive* authority over technical matters related to radio broadcasting. *See Freeman v. Burlington Broadcasters, Inc.* 204 F. 3d 311, 320 (2nd Cir. 2000) (citing *Head v. New Mexico Bd. of Exam’rs*, 374 U.S. 424, 430 n. 6 (1963) (emphasis added)).

Although Congress clearly intended that the Commission have authority over RFI issues, it also expressly preserved some local zoning authority over matters ancillary to the provision of telecommunications services. “Decisions regarding the placement, construction and modification of personal wireless service facilities” were reserved for States. *See* 47 U.S.C. § 332(c)(7). But, the plain language and the legislative history of this section evidences that Congress did not intend to limit the Commission’s general authority over radio telecommunications by enacting § 332(c)(7). *See* H. Rep. No. 104-458, at 209 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 223. On the contrary, Congress only sought to preserve traditional zoning decisions for local authorities.

Anne Arundel County does not seek to exercise authority regarding the placement, construction and modification of personal wireless service facilities through its amendments to Article 28. Rather, Anne Arundel County seeks to regulate RFI and

unilaterally prevent an entity from operating where RFI is experienced. For example, Anne Arundel County requires a permit applicant to certify that the applicant's use of its telecommunications facility will not degrade or interfere with the County's public safety communications systems. *See* Article 28 § 10-125(j)(1). If at any time a facility does degrade or interfere with the County's public safety communications systems, the applicant's certificate of use may be revoked. *See* Article 28 § 10-125(j)(2), *see also* § 10-125(k)(1) and (2).

The foregoing provisions illustrate that Anne Arundel County impermissibly exceeds the boundaries of § 332(c)(7) and seeks to limit the Commission's general authority over telecommunications by attempting to set up a local scheme for controlling and mitigating RFI. The County's efforts in this regard run afoul of existing regulations governing RFI and the resolution of interference issues as well as the Act itself. *See, e.g.*, 47 CFR §§ 1.929, 1.942, 22.352–22.353 and 47 U.S. C. 303(d). Because the federal scheme of telecommunications regulation is so pervasive, there is federal preemption of the field. In addition, there is conflict preemption in this case. The Anne Arundel County Zoning ordinance directly conflicts with federal regulations regarding RFI such that compliance with both the local ordinance and federal regulation is impractical and frustrates the Commission's exercise of its federally granted broad authority over telecommunications. As a result, Anne Arundel's ordinances are federally preempted.

## **II. The Commission and Federal Courts Have Preempted Similar Local Ordinances Seeking to Regulate RFI.**

Both the Commission and Federal courts have held that local ordinances substantially similar to the Anne Arundel Zoning ordinance at issue here, *i.e.* ordinances that seek to regulate RFI, are impermissible in light of the broad federal preemption of

RFI related issues. In *In re Mobilecomm of New York, Inc.* the Commission examined two sections of a town code that prohibited operation of telecommunications facilities that produced “any perceptible electromagnetic interference” with normal radio or television reception within the city. *Mobilecomm*, 2 F.C.C.R. 5519 ¶ 3 n.3 (1987). The Commission held that federal law preempted the local rule. The Commission based its decision on an analysis of the Act, federal precedent and its own long-standing recognition of the breadth of its jurisdiction over cases involving RFI. *Id.* at ¶ 8-11.

Similarly, in *In re 960 Radio, Inc.*, the Commission considered a local ordinance that prohibited permittees from operating any new facility that produced interference to existing facilities. *960 Radio*, FCC 85-578 (1985). The Commission held that it had exclusive jurisdiction over RFI and that local governing authorities were preempted from imposing RFI regulations. *Id.* at ¶ 7 and ¶ 10.

Federal courts have made similar preemption rulings. In *Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commr's.*, the Tenth Circuit Court considered the validity of a local ordinance that prohibited communications towers and antennae from operating in a manner that interfered with public safety communications and required the permit holder to remedy the interference problem. *Southwestern Bell Wireless*, 199 F. 3d. 1185, 1188 (10<sup>th</sup> Cir. 1999). The Court held that the County interference regulation extended beyond traditional zoning authority such as placement, construction and modification and into radio telecommunications, an area of Commission authority. *Id.* at 1191.

Likewise, in *Freeman v. Burlington Broadcasters, Inc.*, the Second Circuit Court considered the validity of a local zoning ordinance that required permittees to remedy any

RFI from tower signals with appliances and devices in local homes. *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2<sup>nd</sup> Cir. 2000). The Court held that allowing local zoning authorities to condition construction and use permits on any requirement to eliminate or remedy RFI “stands as an obstacle to the accomplishment and execution of the full purposes and objections of Congress.” *Id.* at 325 (citations omitted).

Both the Commission and Federal courts have squarely addressed the validity of local ordinances that attempt to regulate matters like RFI under the guise of an exercise of traditional zoning authority. In the foregoing cases, the Commission and Courts alike held that the ordinances were federally preempted. The Anne Arundel Zoning ordinances at issue here are not substantially different from the ordinances considered and rejected by both the Commission and Federal courts. Accordingly, the Commission should issue a Declaratory Ruling that the Anne Arundel County Zoning ordinance is preempted.

With the Commission’s sole authority to regulate RFI goes the responsibility to ensure that public safety communications are not compromised by harmful interference. Section 303 of the Communication’s Act of 1934, as amended, explicitly states that the Commission shall, “Make such regulations...necessary to prevent interference between stations...” *See* 47 U.S.C. § 303(f). Accordingly, the Commission should move quickly to adopt rules that limit, to the maximum extent possible, situations that result in the probability of interference. Further, in the event that a public safety entity and an interfering licensee cannot come to terms on resolution of an interference situation that does occur, it is incumbent on the Commission to ensure that the interference is resolved as expeditiously as possible.

#### **IV. Conclusion**

For the reasons set forth above, TIA respectfully requests that this Commission issue a Declaratory Ruling preempting the recent amendments to Article 28 of the Anne Arundel County Zoning ordinances.

Respectfully submitted,

Telecommunications Industry Association

By: \_\_\_\_\_/s/\_\_\_\_\_

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